

BRB No. 11-0456 BLA

CHARLES NASBY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WESTMORELAND COAL COMPANY)	
)	DATE ISSUED: 02/22/2012
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Amy Jo Holley (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (09-BLA-5476) of Administrative Law Judge Michael P. Lesniak denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case involves a claim filed on June 26, 2008.

The administrative law judge properly noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this living miner's claim, Section 1556 of Public

Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

Although the administrative law judge found that the evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), he found that claimant failed to establish at least fifteen years of qualifying coal mine employment.¹ The administrative law judge, therefore, found that claimant was unable to invoke the rebuttable presumption. *See* 30 U.S.C. §921(c)(4). The administrative law judge also found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.²

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated by 30

¹ Although the administrative law judge credited claimant with a total of twenty-seven years of coal mine employment, he found that claimant worked in underground coal mine employment for only seven of those years. Decision and Order at 4. The administrative law judge found that claimant's remaining twenty years of coal mine employment were spent at an above-ground mine, where claimant was not exposed to coal dust in conditions substantially similar to those of an underground coal mine. *Id.* The administrative law judge, therefore, found that claimant failed to establish at least fifteen years of qualifying coal mine employment. *Id.*

² We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant failed to establish the requisite fifteen years of qualifying coal mine employment necessary for invocation of the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner’s claim, a claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).⁴ We disagree. The record contains the medical opinions of Drs. Gaziano, Zaldivar, and Castle. The administrative law judge permissibly found that the July 24, 2008 x-ray that Dr. Gaziano interpreted as positive for pneumoconiosis was interpreted by Dr. Meyer, a better qualified physician, as negative for pneumoconiosis, thus calling into question the reliability of Dr. Gaziano’s diagnosis of clinical pneumoconiosis. *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983); Decision and Order at 8-9; Director’s Exhibit 14; Employer’s Exhibit 3. Dr. Gaziano also diagnosed legal pneumoconiosis,⁵ in the form of chronic obstructive pulmonary disease (COPD) due to both cigarette smoking and coal mine dust exposure. Director’s Exhibit 14. The administrative law judge, however, permissibly found that Dr. Gaziano’s opinion was not well-reasoned, noting that the doctor provided no explanation for attributing claimant’s COPD to his coal mine dust exposure. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 9. Neither Dr. Zaldivar nor Dr. Castle diagnosed clinical or legal pneumoconiosis. Director’s Exhibit 16; Employer’s Exhibit 4. Because it is based on

United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

⁴ We affirm, as unchallenged on appeal, the administrative law judge’s finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). *Skrack*, 6 BLR at 1-711.

⁵ “Legal pneumoconiosis” includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

substantial evidence,⁶ the administrative law judge's finding, that medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), is affirmed.

In light of our affirmance of the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, we affirm the administrative law judge's Decision and Order denying benefits.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁶ Contrary to claimant's argument, the administrative law judge did not rely solely on negative x-ray evidence to find that claimant failed to establish the existence of pneumoconiosis. Rather, the administrative law judge properly weighed together the evidence relevant to the existence of pneumoconiosis at Section 718.202(a), as required pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), and found that it failed to establish the existence of pneumoconiosis.